Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–708 OF 1995

GOPAL SRI RAM, SITI NORMA YAAKOB AND AHMAD FAIRUZ JJCA

25 NOVEMBER 1996

Civil Procedure *— Appeal — Interference by appellate court — Failure of trial judge to take into account relevant considerations — Whether appellate court could disturb the primary exercise of discretion of trial judge — Whether it is the duty of the appellate court to intervene and set matters right by an exercise of its own discretion*

Land Law *— Restraints on dealings — Caveats — Application for removal of caveat — Failure of caveator to commence proceedings to enforce what it perceived to be its rights under contract — Whether caveat could be permitted to remain on the register if caveator had not timeously commenced proceedings for specific relief*

Land Law *— Restraints on dealings — Caveats — Application for removal of caveat — Failure of trial judge to consider balance of convenience — Whether such consideration is relevant — Whether appellate court could disturb the primary exercise of discretion of trial judge in disallowing the removal of the caveat*

The appellant is the registered proprietor of the subject land ('the land'). On 25 July 1989, the appellant, as vendor, entered into a written agreement of sale with the respondent. The agreement did not stipulate the date on which completion was to take place. On 20 August 1989, the respondent entered a private caveat against the registered document of titles to the land. By a letter dated 9 November 1994, the appellant's solicitors gave the respondent notice to complete the sale and purchase of the subject lands within three months. On 7 February 1995, the respondent's solicitors wrote to say that their client intended to effect completion by making payment of the full purchase price within four months from the date of the letter. On 20 February 1995, the appellant wrote through its solicitors stating that it did not agree to the respondent's proposal and requested the respondent to remove its caveat. The respondent did not, however, remove the caveat. Neither did it commence any proceedings for the specific enforcement of the sale and purchase agreement in question. Thereafter, the appellant applied for the removal of the respondent's caveat. The learned judge refused it principally on the ground that there were serious questions to be tried. Having so held, he did not, however, go on to consider whether the balance of justice lay in favour of the caveat remaining on the register or whether it favoured the removal of the restraint. Counsel for the appellant argued that the learned judge had erred in failing to consider the balance of convenience. She submitted that the caveat could not be permitted to remain on the register because the respondent had not timeously commenced proceedings for specific relief. Counsel also drew the attention of the court to the fact that no action had been instituted even as at the date of hearing of the appeal.

Held, allowing the appeal:

(1) The caveat has remained on the register since 20 August 1989. No doubt it was entered by the respondent initially to protect its interest pending the conveyance of title. Nevertheless, when it became clear in February 1995 that the appellant was not prepared to agree to extend the time limit it had imposed by its solicitors' letter of 9 November 1994, it was incumbent upon the respondent to commence proceedings to enforce what it perceived to be its rights under the contract in question. Yet, no action was ever commenced by the respondent, even up to the date of hearing of the appeal. And no explanation whatsoever was forthcoming from the respondent for this failure. In these circumstances, it would be an affront to justice to prevent the appellant from continuing to deal with the land (see pp 468I and 469A–B).

(2) The issue as to where the balance of justice lies is a most relevant consideration when determining whether a caveat ought to be permitted to remain upon the register and fetter the right of the appellant as registered proprietor to deal with the land. The failure of the judge to address his mind to this vital consideration had fatally flawed the conclusion at which he arrived (see p 469E–F).

(3) Although the decision whether a caveat ought to remain on the register is a matter within the discretion of the judge, it is like all other discretionary matters one that is required to be exercised judicially. An appellate court would be reluctant to disturb the primary exercise of discretion. This is because a court of appeal in a matter such as the present does not possess an original discretion, its initial function being one of review only. However, where, as in the present instance, it is amply demonstrated that the judge in whom the primary discretion is vested has failed to take into account relevant considerations, it is the duty of the appellate court to say so and to intervene and set matters right by an exercise of its own discretion (see p 469G–H).

[Bahasa Malaysia summary

Perayu merupakan tuan punya berdaftar tanah yang diperihalkan ('tanah tersebut'). Pada 25 Julai 1989, perayu, sebagai penjual, telah mengikat suatu perjanjian jualan bertulis dengan penentang. Perjanjian tersebut tidak menetapkan tarikh pada mana penyempurnaan seharusnya berlaku. Pada 20 Ogos 1989, penentang telah memasukkan satu kaveat persendirian terhadap dokumen hakmilik berdaftar tanah tersebut. Melalui surat bertarikh 9 November 1994, peguamcara perayu telah memberikan notis kepada penentang supaya menyempurnakan jualbeli tanah tersebut dalam tempoh tiga bulan. Pada 7 Februari 1995, peguamcara penentang telah menulis bagi menyatakan bahawa klien mereka berniat untuk menguatkuasakan penyempurnaan dengan membuat pembayaran bagi harga belian

sepenuhnya dalam tempoh empat bulan daripada tarikh surat tersebut. Pada 20 Februari 1995, perayu telah menulis melalui peguamcaranya menyatakan bahawa ia tidak bersetuju dengan cadangan penentang dan meminta penentang membatalkan kaveatnya. Namun demikian, penentang tidak membatalkan kaveat tersebut. Ianya tidak juga memulakan sebarang prosiding untuk penguatkuasaan perjanjian jualbeli berkenaan. Selepas itu, perayu memohon untuk pembatalan kaveat penentang. Hakim yang bijaksana telah menolaknya terutamanya atas alasan bahawa terdapatnya persoalan-persoalan serius untuk dibicarakan. Namun begitu, setelah memutuskan demikian, beliau tidak seterusnya mempertimbangkan sama ada imbangan keadilan memihak kepada kaveat tersebut kekal pada daftar atau sama ada ianya memihak kepada pembatalan penyekatan itu. Peguam perayu berhujah bahawa hakim yang bijaksana terkhilaf dalam kegagalan untuk mempertimbangkan imbangan kemudahan. Beliau berhujah bahawa kaveat tersebut tidak boleh dibenarkan kekal pada daftar kerana penentang tidak memulakan prosiding pada masanya untuk mendapatkan relief spesifik. Peguam juga menarik perhatian mahkamah kepada hakikat bahawa tiada tindakan telah dimulakan sungguhpun pada tarikh pembicaraan rayuan.

Diputuskan, membenarkan rayuan:

(1) Kaveat tersebut telah kekal pada daftar sejak 20 Ogos 1989. Tidak diragukan ia telah dimasukkan oleh penentang pada mulanya untuk melindungi kepentingannya sementara menunggu pemindahan hakmilik. Namun demikian, apabila ianya menjadi nyata dalam bulan Februari 1995 bahawa perayu tidak bersedia bersetuju melanjutkan had masa yang dikenakan menerusi surat peguamcaranya bertarikh 9 November 1994, penentang wajib memulakan prosiding untuk menguatkuasakan apa yang dilihatnya sebagai haknya di bawah kontrak berkenaan. Sungguhpun demikian, tiada tindakan pernah dimulakan oleh penentang, walaupun sehingga tarikh pembicaraan rayuan. Dan tiada penjelasan sama sekali telah diberikan oleh penentang atas kegagalan ini. Dalam keadaan ini, ianya akan merupakan satu penghinaan kepada keadilan untuk menghalang perayu daripada terus berurusan dengan tanah tersebut (lihat ms 468I dan 469A–B).

(2) Isu mengenai di manakah terletaknya imbangan keadilan merupakan pertimbangan yang amat relevan ketika menentukan sama ada suatu kaveat patut dibenarkan kekal pada daftar dan membelenggu hak perayu sebagai tuan punya berdaftar untuk berurusan dengan tanah tersebut. Kegagalan hakim untuk memikirkan pertimbangan yang sangat penting ini telah amat memudaratkan keputusan yang dicapainya (lihat ms 469E–F).

(3) Walaupun keputusan sama ada sesuatu kaveat seharusnya kekal pada daftar merupakan perkara yang berada dalam budi bicara hakim, ianya adalah sama seperti kesemua perkara budi bicara yang lain, sesuatu yang perlu dilaksanakan secara kehakiman.

Sesebuah mahkamah rayuan akan berasa ragu-ragu untuk mengganggu pelaksanaan utama budi bicara. Ini adalah kerana sesebuah mahkamah rayuan dalam perkara sepertimana yang tersebut semasa ini tidak memiliki budi bicara yang asal, iaitu fungsi awalnya adalah semata-mata kajian semula sahaja. Walau bagaimanapun, di mana, sepertimana dalam keadaan di sini, ianya telah ditunjukkan dengan secukupnya bahawa hakim yang mana diletakhak budi bicara utama telah gagal mengambil kira pertimbangan yang relevan, ianya merupakan tugas mahkamah rayuan untuk menyatakan sedemikian dan untuk masuk campur dan membetulkan keadaan dengan melaksanakan budi bicaranya sendiri (lihat ms 469G–H).]

Notes

For cases on removal of caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2225–2323.

For cases on interference by appellate court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 465–469.

Cases referred to

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)

Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782 (refd)

Teo Ai Choo v Leong Sze Hian [1982] 2 MLJ 12 (refd)

Appeal from: Originating Motion No 25–25 of 1995 (High Court, Pulau Pinang)

Jannu Babjan (*Lim Cheng Poh, Lim & Rahim*) for the appellant.
Ganesh Ponniah (*Geh Cheng Lok & Co*) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): This appeal, directed against the order of the High Court at Penang, refusing the appellant's application to remove the respondent's caveat raises a short but important point. The brief facts relevant to the appeal are as follows.

The appellant is the registered proprietor of all those lands held under Lots 3440 and 3441, Mukim 13, Daerah Timor Laut, Penang ('the subject land'). On 25 July 1989, the appellant, as vendor, entered into a written agreement of sale with the respondent under the terms of which the former agreed to sell to the latter the subject land and one other lot at a price of RM26,000 per acre. The agreement did not stipulate the date on which completion was to take place. The sale and purchase of the third lot was completed and it does not form the subject matter of the present litigation. On 20 August 1989, the respondent entered a private caveat against the registered document of titles to the subject land.

By a letter dated 9 November 1994, the appellant's solicitors gave the respondent notice to complete the sale and purchase of the subject lands within three months, that is to say, not later than 8 February 1995. The reply to the appellant's letter did not come until 7 February 1995 when the respondent's solicitors wrote to say that their client intended to effect completion by making payment of the full purchase price within four months from the date of the letter. On 20 February 1995, the appellant wrote through its solicitors stating that it did not agree to the respondent's proposal. This letter also called upon the respondent to remove its caveat. The respondent did not, however, remove the caveat. Neither did it commence any proceedings for the specific enforcement of the sale and purchase agreement in question.

Thereafter, the appellant took out an originating motion on 29 March 1995 seeking an order for the removal of the respondent's caveat. The learned judge who heard the application, after a careful analysis of the evidence placed before him, refused it principally on the ground that there were serious questions to be tried. Having so held, he did not, however, go on to consider whether the balance of justice lay in favour of the caveat remaining on the register or whether it favoured the removal of the restraint. In particular, it does not appear from his judgment that he took into account the absence of any steps taken by the respondent to enforce its contractual rights. All he said was that the status quo ought to be proceeded until the matter is tried. However, he does not appear to have appreciated, sufficiently or at all, that there was no 'matter to be tried' because no action had been commenced by the respondent.

Before us, counsel for the appellant properly conceded that there was a caveatable interest and that the matters put in issue during the caveat proceedings did raise serious questions to be tried. She however argued that the learned judge had erred in failing to consider the balance of convenience. She submitted that the caveat could not be permitted to remain on the register because the respondent had not timeously commenced proceedings for specific relief. Counsel also drew our attention to the fact that no action had been instituted even as at the date of hearing of this appeal.

We are of the view that there is merit in these arguments and that they are supported by authority. In *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 at p 215F–H, Lord Diplock said:

> In the case of a refusal by the vendor to complete a contract for the sale of land, the normal remedy of the purchaser as plaintiff in an action is an order for specific performance of the contract; and in the absence of special circumstances, if it were shown that the vendor threatened to dispose of the land while the action was still pending, the balance of convenience would be in favour of granting an interlocutory injunction to prevent his doing so, provided that the plaintiff would be in a position to satisfy his undertaking as to damages if the action should fail at trial. So too in an application by the caveator under s 327 for removal of a caveat, once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of

convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until *proceedings, brought and prosecuted timeously by the caveator*, for specific performance of the contract of sale which he alleges had been tried. (Emphasis added.)

The importance of timeous institution and prosecution of proceedings in this area of the law is well brought out by the judgment of Sinnathuray J, in the Singapore High Court in *Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12. It is a brief judgment and merits reproduction here:

> The matter before me is a simple one. Mr KS Chung for the plaintiff has raised five serious points. I need only deal with the last one, the fifth point, that on the subject of delay.
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> First, I accept the decision in *Plimmer Bros v St Maur* (1906) 26 NZLR 294. In that case, Stout CJ in New Zealand, on an application to remove a caveat, on facts similar to the present case, where the defendant had commenced no action against the plaintiff relating to the land in respect of which a caveat was lodged, referred to several reported cases and said —
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> > 'It was his duty to commence an action promptly if he considered himself entitled to specific performance. ... Here nothing was done for nearly sixteen months, and then a caveat was lodged. More than a month has elapsed since then, and still no action has been commenced. In my opinion, an action for specific performance under such circumstances would be hopeless, and a caveat under such circumstances must be deemed vexatious ... in my opinion, to prevent a man dealing with his property after such a long delay is so inequitable that the court will not lend its assistance to such a proceeding.'
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> Next, there is a Singapore decision of the learned Chief Justice in Originating Summons No 192 of 1979 where he held that a delay of 2½ months was sufficient for a caveat to be removed forthwith.
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> In this case, on the facts before me, I find that there has been inordinate and inexcusable delay. The dispute between the parties has arisen from an agreement for sale and purchase of a house in Serangoon Garden signed on 1 September 1979. It was not till 21 months later that a caveat was lodged on 11 June 1981. Then, from this date to the date of the hearing of this application on 7 May 1982, no action has been commenced by the defendant against the plaintiff in respect of the dispute, a lapse of 11 months. In these circumstances, having regard to the foregoing, on the ground of delay alone, the caveat must be removed forthwith.
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> My decision is entirely on the caveat. There is nothing to prevent the defendant from commencing action against the plaintiff on the alleged claim of breach of trust.
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> I made an Order in Terms of the Originating Summons with costs to the plaintiff. There was liberty to apply.

In the present instance, the caveat has remained on the register since 20 August 1989. No doubt it was entered by the respondent initially to protect its interest pending the conveyance of title. Nevertheless, when it became clear in February 1995 that the appellant was not prepared to agree to extend the time limit it had imposed by its solicitors' letter of 9 November 1994, it was incumbent upon the respondent to commence proceedings to enforce what it perceived to be its rights under the contract

A in question. Yet, as earlier observed, no action was ever commenced by the respondent, even up to the date of hearing of this appeal. And no explanation whatsoever was forthcoming from the respondent for this failure. In these circumstances, it would be an affront to justice to prevent the appellant from continuing to deal with the subject lands.

B The approach to be adopted by a judge to whom an application is made for the removal of a caveat has been established by this court in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 and *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782. In the latter case, this court said (at pp 788–789):

C > The principles formulated in *Luggage Distributors* as applied to the present appeal require an investigation into the following matters. First, whether the respondent, on the material set out by him in his application under s 323(1) of the [National Land Code 1965], has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support
D > of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

E In the case at hand, the first two steps are academic by reason of the concession made by counsel for the appellant. We are here only concerned with the learned judge's failure to address his mind to the third step in the inquiry before him. The issue as to where the balance of justice lies is a most relevant consideration when determining whether a caveat ought to be permitted to remain upon the register and fetter the right of the
F appellant as registered proprietor to deal with the subject lands. In our judgment, the failure of the judge to address his mind to this vital consideration has fatally flawed the conclusion at which he arrived.

Although the decision whether a caveat ought to remain on the register is a matter within the discretion of the judge, it is like all other discretionary
G matters one that is required to be exercised judicially. One can, of course, quite well appreciate an appellate court's reluctance to disturb the primary exercise of discretion. This is because a court of appeal in a matter such as the present does not possess an original discretion, its initial function being one of review only. However, where, as in the present instance, it is amply demonstrated that the judge in whom the primary discretion is
H vested has failed to take into account relevant considerations, it is the duty of this court to say so and to intervene and set matters right by an exercise of its own discretion.

For the reasons given, we allowed the appeal and made an order directing the respondent's caveat to be removed forthwith. The appellant
I was given the costs of this appeal and those incurred in the court below. The deposit lodged in court was ordered to be refunded to the appellant.

Appeal allowed.

Reported by Loo Lai Mee